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Hayes v. Kessler Respondent's Brief Dckt. 43327

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**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

MICHAEL T. HAYES,

Plaintiff-Appellant,

vs.

CORRECTIONS CORPORATION OF
AMERICA; THE IDAHO CORRECTIONAL
CENTER; TIM WENGLER WARDEN; DAN
MELODY; TOM KESSLER; SGT FLEMMING
GREEN; MELODEE ARMFIELD; SHANE
JEPSEN,

Defendants-Respondents.

Supreme Court Docket
No. 43327-2015

Ada County Case No. CV OC 2013-
19420

RESPONDENT'S BRIEF

**APPEALED FROM THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR ADA COUNTY**

THE HONORABLE DANIEL C. HURLBUTT, JR., PRESIDING

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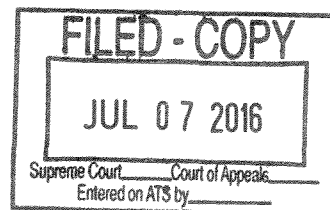


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I.
STATEMENT OF THE CASE

A. Nature of the Case

Appellant Michael T. Hayes, is an inmate under the jurisdiction of the Idaho Department of Corrections (“IDOC”). On October 25, 2013, Hayes brought a civil rights complaint, pursuant to 42 U.S.C. § 1983, alleging various violations of his rights pursuant to the First, Eighth, and Fourteenth Amendments of the United States’ constitution. (R. Vol. I, pp. 21-22) Hayes raised multiple causes of action through his complaint. He alleged that Sergeant Green—not a defendant in this action—improperly refused to give him a dental pick while he was in segregation which caused food to become trapped between his teeth and resulted in a serious gum infection. (R. Vol. I, p. 15) He also alleged that Sergeant Green made threatening and disparaging remarks toward him while at the prison, and filed a false disciplinary offense report (“DOR”) against him. (*Id.* at 17-20) Accordingly, he alleged that Defendant Tom Kessler conspired with Sergeant Green in both of these incidents. (*Id.*) Hayes then alleged that this false disciplinary report was improperly confirmed by Defendant Melodee Armfield, who also allegedly denied him due process rights in accordance with established disciplinary procedure. (*Id.* at R. Vol. I, p. 20-21)

B. Statement of Facts

Sometime in July 2011, while Hayes was housed in administrative segregation at ICC, he requested a dental pick from ICC Sergeant Green. (R. Vol. I, p. 14) Sergeant Green denied Hayes’ request because dental picks were not allowed in Hayes’ housing unit. (*Id.* at 26) Dental picks were

not allowed in administrative segregation housing, pursuant to IDOC based on SOP 320.02.01.001 v.4.9. (*Id.*) Hayes was housed in administrative segregation at that time. (*Id.*)

Importantly, Hayes had dental issues—including extensive gum disease—long before July 2011. Dr. Wayne Peterson, D.M.D., who treated Hayes in prison, stated that Hayes required extensive dental care prior to and during his incarceration. (R. Vol. I, p. 58-62)¹ Hayes' dental records throughout his incarceration demonstrate that his gum infection problems did not result from the lack of a dental pick. (*Id.* at 61) Rather, he had this infection prior to his incarceration. Periodontal disease is a chronic condition that takes place over years. (R. Vol. I, p. 58-62) Throughout 2004-2011, Hayes was repeatedly treated for gingivitis and periodontal disease. (*Id.*) Even during the brief period he was housed in segregation and was denied access to a dental pick, he actually received a dental examination and cleaning which did find a piece of food caught in his teeth, but was not be the cause of any periodontal disease because that disease was preexisting. (*Id.* at 60) After Hayes received a dental cleaning which cleaned out the area Hayes was concerned with, he had at least four more dental appointments in 2011. (*Id.* at 60-61)

¹The District Court noted that at the summary judgment stage, Hayes submitted only an unsworn response largely devoid of any citations to the record before the court. (R. Vol. I, p. 52, 62, 64, and 66) Defendants, however, submitted sworn declarations of Dr. Wayne Peterson, D.M.D., Defendant Tom Kessler, and Defendant Melodee Armfield, accompanied with various exhibits and evidence. (*Id.* at 3) The District Court extensively quoted these sworn declarations verbatim in its *Memorandum Decision and Order Re: Defendants' Motion for Summary Judgment*, and these un rebutted facts are cited herein, as Hayes only requested the standard clerk's record to support his appeal.

Hayes also alleges that on July 13, 2011, ICC Sergeant Green told him, "Why don't you smart off to me like you do to other staff members and I will punch your face in and drop you." (R. Vol. I, p. 28) Hayes also alleged that Sergeant Green made racially discriminatory and sexual statements towards another prison staff member. (*Id.*) Hayes took advantage of the ICC grievance policy to report this these alleged actions. The grievance was denied by an ICC employee, then routed to Kessler in order to review and provide an additional response. (*Id.* at 29) After review, Kessler concurred with the Level 1 response and denied the grievance. (*Id.*) The grievance was then routed to the Level 3 responder, who affirmed the lower responses and ultimately denied the grievance. (*Id.*)

Finally, Hayes received two DORs in July 2011 for his aggressive behavior towards prison staff, which led to disciplinary hearings where he alleges that Armfield violated his constitutional rights by not providing him due process with respect to the second DOR and sanctioning him with permanent housing administrative segregation. (R. Vol. I, p. 20-21) He received the first of these DOR's related to conduct from July 5, 2011, and after an administrative delay, the disciplinary hearing was scheduled for July 19, 2011. (*Id.* at 64-66)

However, on July 16, 2011, Hayes was served with another DOR filed by Sergeant Green for an incident where Hayes was aggressive and verbally assaulted three correctional officers on July 13, 2011. (R. Vol. I, p. 65) Following service of the DOR, Armfield, pursuant to her responsibilities as disciplinary hearing officer, scheduled a separate disciplinary hearing for this DOR also for July 19, 2011. (*Id.*)

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Hayes had these two disciplinary hearings scheduled on July 19, 2011 for each of the previously discussed DORs. (R. Vol. I, p. 64-65) The first disciplinary hearing was for the July 5, 2011 DOR, while the second disciplinary hearing was for the July 13, 2011 DOR. (*Id.*) During the first disciplinary hearing, Hayes requested to see footage from the video security camera located in the day room. (*Id.*) For security purposes, ICC policy does not allow inmates to view video footage from security cameras. and Armfield denied Hayes' request to view the video footage. (*Id.*) After being denied access to view the footage, Hayes became very agitated and disruptive. (*Id.*) His behavior was so disruptive, that Armfield was forced to have him removed from the hearing. (*Id.*) After Hayes was removed from the hearing, Armfield continued with the disciplinary hearing process according to established procedure. (*Id.*) She considered the evidence presented to her, confirmed the rule violation, and issued formal sanctions against Hayes restricting his property, commissary, telephone, and issuing detention. (*Id.*)

Armfield then proceeded with the second disciplinary hearing regarding Sergeant Green's July 16, 2011 DOR. (R. Vol. I, p. 66) Because Hayes' behavior had been so disruptive during the first hearing, he was not allowed to return for his second hearing, per IDOC policy. (*Id.*) An inmate cannot attend his disciplinary hearing if the inmate displays disruptive or violent behavior. During the hearing, Armfield considered the evidence and confirmed the rule violation. (*Id.*) However, Armfield did not impose any discipline or sanctions against Hayes for this second DOR. (*Id.*)

C. Procedural History

Hayes made multiple other allegations against other defendants which are not addressed in this brief, because those defendant were either never served or were dismissed prior to summary judgment, and are not at issue on appeal here.² (See generally, R. Vol. I pp. 5-25) Thus, any claims corresponding to these dismissed Defendants were never addressed by the District Court, as the only remaining Defendants were former ICC employees Melodee Armfield and Tom Kessler. The remaining claims were allegations that: (1) Kessler conspired with prison staff to deprive Hayes of a dental pick, which caused food to be trapped between his teeth and resulted in a gum infection; (2) Kessler conspired with prison staff to cover up Sergeant Green's allegedly improper behavior; and (3) Armfield found Hayes guilty of a disciplinary offense report ("DOR") without providing Hayes with a hearing, and this directly resulted in a sanction of housing placement in administrative segregation. (*Id.* at 14-22)

Defendants moved for summary judgment based on Hayes' failure to factually establish that he had suffered any constitutional violations. In support of that motion, they filed sworn declarations from Kessler, Armfield, and ICC dentist Dr. Wayne Peterson, D.M.D. (R. Vol. I, p. 3) Hayes filed no sworn statements in response, but filed various unsworn statements which the District Court did not consider other than to note that even the substance of those statements would

²Hayes failed to serve Defendants Corrections Corporation of America, Warden Timothy Wengler, Dan Melody, Sergeant Flemming Green, and Shane Jepsen, resulting in their dismissal from the case. (R. Vol. I, pp. 46-47) Additionally, Defendant ICC was later dismissed from the case as an improper party to the lawsuit. (*Id.* at 40-44).

be insufficient to create an issue of fact with the evidence provided by Defendants in support of summary judgment as a matter of law. (See *id.* at 62, 64, and 66) Summary judgment was then granted to Defendants Kessler and Armfield and judgment was entered in their behalf. (*Id.* at 68)

II.

ISSUES PRESENTED ON APPEAL

1. Were Hayes' Constitutional Rights Violated by Defendant Kessler When He Was Allegedly Denied a Dental Pick While In Segregation?
2. Were Hayes' Constitutional Rights Violated by Defendant Kessler When Officer Green Allegedly Made Disparaging Remarks Towards Hayes?
3. Were Hayes' Constitutional Rights Violated by Defendant Armfield Through the Disciplinary Procedures Imposed Upon Him at ICC?

III.

ARGUMENT

The District Court properly granted Defendants' motion for summary judgment because Hayes failed to rebut the sworn evidence submitted by Defendants that there were no constitutional violations against him. Even when considering Hayes' unsworn statements, the un rebutted evidence provided by Defendants established that summary judgment was warranted as a matter of law because Hayes suffered no violation of constitutional rights for the lack of a dental pick, from any alleged threats or disparaging remarks, or from the disciplinary procedures at ICC. Defendants respectfully request that the Court affirm the judgment.

A. Standard of Review

When reviewing an appeal of an order granting summary judgment, the standard of review is the same as that used by the trial court in ruling on the motion. *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 955 (2004). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Moreover, the Court must draw all reasonable inferences and conclusions in favor of the party resisting the motion. *Id.*

The party moving for summary judgment initially bears the burden of establishing both the absence of a genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *McCoy*, 120 Idaho at 769, 820 P.2d at 364. This burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that proof of a particular element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

Once the moving party establishes the absence of a genuine issue of fact, the burden shifts to the nonmoving party to produce admissible sworn evidence, which sets forth specific facts showing the existence of a genuine issue of fact on the elements challenged by the moving party. I.R.C.P. 56(e); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720 21, 791 P.2d 1285, 1299 1300 (1990); *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530 31, 887 P.2d 1034, 1037 38 (1994). An opposing party may not merely rest on allegations contained in his pleadings nor may the opposing party's case rest on speculation or conclusory assertions. *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) (emphasis added); *McCoy*, 120 Idaho at 769, 820 P.2d at 364. The party opposing the motion must produce evidence, by affidavit or other sworn testimony, to show that there is indeed a genuine issue for trial. I.R.C.P. 56(e) (emphasis added); *Olsen*, 117 Idaho at 720, 791 P.2d at 1299.

B. The District Court Did Not Err In Determining that Kessler Did Not Conspire Against Hayes In Denying Him a Dental Pick as a Matter of Law.

In the case of Defendant Tom Kessler,³ there was no issue of material fact that he did anything that deprived Hayes of his constitutional rights. Primarily, there was no constitutional deprivation because Hayes had periodontal gum disease years before he was denied a dental pick in segregation during July 2011. (See R. Vol. I, p. 58-61) As the District Court rightfully held, because

³While the majority of the allegations raised in Hayes' complaint include a Sergeant Green, he was never served the lawsuit and therefore has never been a party to these proceedings. Accordingly, because vicarious liability does not apply to constitutional actions brought under § 1983, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), any alleged actions that Sergeant Green took are irrelevant to the potential liability of the remaining parties in the lawsuit.

the gum infections he complained of were not a result of a lack of a dental pick, there cannot be any constitutional violation at all with respect to this denial of a dental pick. (*Id.* at 61-62) There was no deliberate indifference to Hayes' medical condition when he received continuous dental treatment and there is no medical evidence that a lack of a dental pick caused or escalated any serious medical need.

However, even assuming that Hayes could establish a constitutional violation, his unsworn statements are insufficient to establish that Kessler participated in a conspiracy. Hayes alleges that Kessler conspired with Sergeant Green and other prison staff members to deprive him of a dental pick in violation of the Eighth Amendment prohibition against cruel and unusual punishment. (R. Vol. I, p. 14-16) To prove a conspiracy, the plaintiff must show "an agreement or meeting of the minds to violate constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (quotations and citations omitted). If the plaintiff cannot produce evidence that the defendants intended to violate his constitutional rights, then his conspiracy claim must fail. *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (emphasis added). Summary judgment is appropriate if the record lacks evidence of a conspiracy. *Id.* (affirming the granting of summary judgment because police officers had probable cause to arrest defendant and the record contained no evidence of the officer's intent to violate constitutional rights). "A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988).

Hayes' conspiracy claim is based on an allegation that the deprivation of the dental pick was a result of Kessler and prison staff conspiring to violate his Eighth Amendment rights. (R.

Vol. I, p. 14-16) The Eighth Amendment prohibition against cruel and unusual punishment imposes duties on prison officials to “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). “[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care.” *Id.*

To establish a violation of the Eighth Amendment, an inmate must prove two elements. First, the inmate must objectively show that he was deprived of something sufficiently serious. *Id.* at 834. “A deprivation is sufficiently serious when the prison official’s act or omission results in the denial of the minimal civilized measure of life’s necessities.” *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009). Second, the inmate must subjectively show that the deprivation occurred with deliberate indifference to his health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference exists when an official knows of and disregards a serious medical condition or when an official is “aware of facts from which the inference could be drawn that a substantial risk of harm exists,” and actually draws such an inference. *Id.* at 837. Deliberate indifference can be “manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). (footnotes omitted). The indifference to a prisoner’s needs must be substantial. *Lemire v. California Dep’t of Corrections and Rehabilitation*, 726 F.3d 1062, 1081-82 (9th Cir. 2013). “Mere indifference, negligence, or medical malpractice will not support this claim.” *Id.* at 1082 (quotations omitted).

Hayes appears to base his Eighth Amendment claims against Kessler on the fact that Kessler affirmed the denial of Hayes' grievance against Sergeant Green. (R. Vol. I, p. 14-16) As discussed above, Hayes filed a grievance asserting that Sergeant Green refused to provide him a dental pick. (*Id.* at 26-27) The grievance was denied because dental picks were not allowed in Hayes' segregation housing unit. (*Id.*) Kessler was the Level 2 responder and concurred with the denial of Hayes' grievance. (*Id.*) Only based on Kessler's action of denying the grievance which was grounded on clear IDOC policy, Hayes alleges that Kessler was part of a conspiracy to deny him a dental pick. Hayes' claim fails for several reasons. First, Hayes' lack of a dental pick was not a sufficiently serious deprivation because the lack of a dental pick did not cause Hayes' gum infections. Second, Kessler's actions were proper because dental picks were not allowed in Hayes' housing unit pursuant to IDOC policy. Third, Kessler's action of affirming the denial of Hayes' grievance does not constitute a conspiracy to violate Hayes' 8th Amendment rights.

- 1. Hayes' Lack of a Dental Pick Was Not a Sufficiently Serious Deprivation Because the Lack of a Dental Pick Did Not Cause Hayes' Gum Infections.**

The denial of a dental pick to Hayes did not cause any constitutional violation because his serious gum infection long predated the denial and a dental pick was not material to his medical condition at that time. Hayes alleges that Sergeant Green's refusal to give him a dental pick caused him to have a serious gum infection. (R. Vol. I, p. 15) However, Hayes' dental experience at ICC demonstrates that his gum infection was the result of a long history of poor dental health. (*Id.* at 58-61) Hayes' dental records indicate that he had gum disease as early as 2004. (*Id.* at 58) Symptoms

of gum disease— such as inflamed gingiva, bleeding gums, and subgingival calculus—were prevalent in 2005 and 2007. (*Id.*) Additionally, Hayes admitted in 2007 that he had gum disease when he informed a dentist that he suffered from periodontal disease. (*Id.* at 59) This was confirmed in 2009 when dental staff diagnosed Hayes with type II-III periodontal disease. (*Id.*) As a result of his gum disease, Hayes had several teeth break below the gum line, which required five teeth to be extracted. (*Id.* at 60-61)

When Hayes visited with ICC dentist Wayne Peterson on July 28, 2011—during the time he alleges he was prohibited from having a dental pick—Dr. Peterson did not observe anything beyond Hayes’ usual and longstanding gum disease. (R. Vol. I, p. 60) Dr. Peterson observed that Hayes’ gums were puffy, but attributed that to Hayes’ periodontal disease, and not the food trapped between his tooth and gums. (*Id.*) There is no evidence to support Hayes’ claim that his lack of a dental pick for 39 days in the summer of 2011 was the cause of his longstanding gum infections, in fact, the unrebutted medical opinion of Dr. Peterson is that his infection “was a result of years of periodontal disease and poor dental health and not the result of the lack of a dental pick of 39 days.” (*Id.* at 61) Moreover, Dr. Peterson immediately removed the food from his teeth at the July 28, 2011, appointment and Hayes received a cleaning shortly thereafter. (*Id.* at 60) Thus, even though Hayes did not have a dental pick, he still received appropriate dental care during the time frame in which he alleges his constitutional rights were violated.

There can be no constitutional violation when there is no action causing or escalating a serious medical need. The evidence in the record through the medical opinion of Hayes’ treating

dentist clearly indicates that he received adequate dental care and that the lack of a dental pick had nothing to do with Hayes' preexisting and extensive serious gum disease. Further, with respect to Kessler as a named defendant, there is no evidence that he had any direct involvement in property provided to Hayes or the medical care provided to Hayes. Kessler simply denied Hayes' grievance as a Level 2 responder. Accordingly, Hayes failed to demonstrate that Kessler's actions were violative of Hayes' Eighth Amendment rights and therefore summary judgment was appropriate and should be upheld.

2. Kessler's Denial of Hayes' Grievance was Proper Because Dental Picks Were Not Allowed in Hayes' Housing Unit.

Further, even assuming arguendo that denial of a dental pick had some effect on Hayes' serious gum disease, Kessler's denial of Hayes' grievance would still did not violate any constitutional right because dental picks were not allowed in Hayes' housing unit by IDOC policy, and it is clear that he received an adequate substitute dental procedure through examination and cleaning. In the response to Hayes' August 22, 2011 grievance, Hayes was informed by ICC staff that "[d]ental picks are not included on the list of allowable property for Segregation inmates in IDOC SOP 320.02.01.001, Restrictive Housing." (R. Vol. I, p. 26) Hayes provided no sworn evidence to the District Court which would have created an issue of material fact that dental picks were not allowed in restrictive housing. Accordingly, Hayes was not allowed to have a dental pick, and there was no constitutional violation in denying him a dental pick while in restrictive housing.

In the complaint, Hayes attached a purchase order form which inmates use to purchase items from commissary.⁴ (R. Vol. I, p. 30-31) However, Hayes did not establish any evidence to support that this commissary purchase order form had some authority as a governing document controlling whether an inmate was actually allowed a specific item throughout the prison. ICC staff informed Hayes that SOP 320.02.01.001 was the governing document controlling what property an inmate was allowed to have within a particular housing unit. (R. Vol. I, p. 26) Therefore, the commissary purchase order form attached to Hayes' complaint does not indicate that Hayes was allowed to have a dental pick in restrictive housing. Instead, the governing document is SOP 320.02.01.001, and there is no evidence that this document allows dental picks as property in restrictive housing units.

Based on the foregoing, Sergeant Green properly denied Hayes' request for a dental pick because dental picks were not allowable property in Hayes' restrictive housing unit. (R. Vol. I, p. 26-27) The Level 1 responder recognized that dental picks were not allowable property and properly denied Hayes' grievance. (*Id.*) As the Level 2 responder, Kessler also recognized that dental picks were not allowed in restrictive housing and concurred with the Level 1 response. (*Id.*) This was the right decision and the proper result. Hayes had no constitutional right to possess an item that was prohibited in his housing unit. In addition, as already discussed, Hayes received a dental examination

⁴Hayes has also attached many "Exhibits" to his Opening Brief, which is improper under the Idaho Rules of Appellate Procedure, as they should have been included in the Clerk's Record as documents filed with the District Court. Respondents object to the inclusion of these documents and request that this Court disregard them in their determination of this matter, but in the interest of a complete argument, will still address them here.

and cleaning during the period which he alleges that he was denied a dental pick. Thus, while he did not receive a dental pick, he received even more extensive dental treatment, which again, was an ongoing attempt to treat his long-existing serious gum disease. Accordingly, Hayes cannot prove that his constitutional rights were violated based on Kessler's decision as the Level 2 responder to deny his grievance. The decision to dismiss from the District Court should be upheld.

3. Kessler Followed Proper Policy and Procedure By Denying Hayes' Grievance Regarding the Dental Pick and Did Not Conspire to Violate Hayes' 8th Amendment.

On August 23, 2011, Kessler received Hayes' grievance and was required to submit a Level 2 response. (R. Vol. I, p. 26-27) Kessler reviewed the grievance, Hayes' suggested solution, the Level 1 response, and the applicable rules, policies, and SOPs, and after doing so, Kessler concluded that the Level 1 response was appropriate because Hayes was not allowed to have a dental pick in his housing unit. (*Id.*) Accordingly, Kessler denied Hayes' grievance. (*Id.*) There is no evidence that Kessler had any direct contact with Hayes or Sergeant Green, or had any part in the original denial of a dental pick while Hayes' was housed in administrative segregation.

Hayes' allegation that Kessler conspired to deprive him of a dental pick is simply a conclusory allegation with no factual support. Conclusory allegations unsupported by facts are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Roman v. State*, 125 Idaho 644, 649 (Ct. App. 1994). Hayes provided no evidence that Kessler made an agreement or even had any contact with Sergeant Green or any other prison staff in order to violate Hayes' Eighth Amendment rights. Kessler's action of denying Hayes' grievance

was based on the grievance itself, Hayes' suggested solution, the Level 1 response, and the applicable rules, policies, and SOPs. Kessler's actions were not based on any conspiracy to deprive Hayes of a dental pick. Accordingly, there is no evidence, beyond Hayes' conclusory allegations, that Kessler conspired to violate Hayes' Eighth Amendment rights by denying his grievance. Therefore, summary judgment for Kessler was appropriate as a matter of law and should be upheld by this Court.

In addition, in Hayes' Opening Brief, he makes various allegations that Kessler's agreement with the Level 1 grievance response was a "failure to correct a subordinate's error. . . and the supervisor is as culpable for it as if he had instructed the subordinate to engage in that misconduct." (*Opening Brief*, p. 2) However, this conclusory statement is without legal or factual basis. Again, the denial of the dental pick was not error, or misconduct, but rather was in accordance with IDOC policy. As such, neither Sergeant Green nor Kessler did anything wrong, and violated none of Hayes' constitutional rights. Hayes has produced no evidence to establish that dental picks were actually approved property by IDOC or ICC for inmates housed in segregation housing, and as such, summary judgment was appropriate for Kessler.

C. **Kessler is Entitled to Summary Judgment as a Matter of Law Because He Did Not Conspire With Prison Staff to Cover Up Sergeant Green's Alleged Threat.**

Hayes contends that Kessler conspired with prison staff to cover up Sergeant Green's alleged threat and harassment. (R. Vol. I, p. 19) First and foremost, threats or disparaging remarks alone are insufficient to establish a constitutional violation. *See Regelman v. Rustin*, 2011 WL

1899779, *7 (citing *Burkholder v. Newton*, 116 Fed.Appx. 358, 360 (3d Cir. 2004); *Morgan v. Ward*, 699 F.Supp. 1025 (N.D. N.Y. 1988)). So even if what Hayes alleges is assumed to be true, it would not be considered a constitutional violation, and there can be no conspiracy to “cover up” an otherwise non-violative act.

With respect to Kessler specifically as the only named defendant, and in like manner to his grievance regarding dental picks, Hayes also bases this claim on the fact that Kessler affirmed the denial of Hayes’ grievance against Sergeant Green. (R. Vol. I, p. 28-29) Hayes filed a grievance asserting that Sergeant Green made a threatening statement against him and made harassing statements against a member of prison staff. (*Id.*) This grievance was denied by the Level 1 responder, Officer Shane Jepsen, who found that Sergeant Green instead spoke with Hayes about his excessive property and never made the statements Hayes alleged. (*Id.*) The grievance was then routed to Kessler to provide the Level 2 response. (*Id.*) Kessler reviewed the grievance, Hayes’ suggested solution, the Level 1 response, and the applicable rules, policies, and SOPs. (*Id.*) After review, Kessler concurred with the Level 1 response and denied the grievance. (*Id.*)

When Kessler denied Hayes’ grievance, he was simply affirming the prior response made by Officer Shane Jepsen. As required, Kessler reviewed the grievance and all applicable materials and based on that review, confirmed the Level 1 response. (R. Vol. I, p. 28-29) His decision was not based on a conspiracy to cover up Sergeant Green’s actions. Instead, his actions were based on the policies and procedures associated with his employment as the assistant warden at ICC. Hayes has provided no evidence, beyond his bare and conclusory allegations, that Kessler

was engaged in a conspiracy to violate his constitutional rights. Accordingly, Kessler was entitled to summary judgment as a matter of law in regards to this allegation and his dismissal should be upheld.

D. Armfield is Entitled to Summary Judgment as a Matter of Law Because She Conducted Proper Disciplinary Hearings in Accordance with ICC Policy.

Hayes alleges that Sergeant Green filed a false disciplinary report (“DOR”) against him on July 13, 2011 and that as a result, Armfield violated his due process rights by finding him guilty of that DOR without a hearing. (R. Vol. I, p. 20-22) Specifically, Hayes alleges that he was not given notice of the hearing date and time for the July 13, 2011 DOR, he was not allowed to read his statement into the record, and he was not allowed to get witness statements. (*Id.* at 20) Hayes also alleges that as an inappropriate sanction for this DOR, he was placed in administrative segregation. (*Id.* at 21) All of these allegations are without merit. Hayes received adequate process for his DOR and, in fact, received no sanction as a result of Sergeant Green’s July 13, 2011 DOR.

Inmates subject to disciplinary actions are entitled to certain procedural protections under the Due Process Clause; however, they are not entitled to the full panoply of rights afforded to criminal defendants. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Generally, an inmate is entitled to advance written notice of the charge against him and the evidence relied upon to issue disciplinary action. *Id.* at 563. An inmate also has the right to a hearing at which he may call witnesses and present documentary evidence, so long as doing so will not be unduly hazardous to institutional safety or correctional goals. *Id.* at 566; *Ponte v. Real*, 471 U.S. 491, 499 (1985).

Substantive due process requires that there be “some evidence” in the record supporting the decision of the disciplinary hearing officer, but there is no requirement that the decision be proved to a reasonable doubt or even a preponderance standard. *Superintendent v. Hill*, 472 U.S. 445, 454 (1985).

As discussed previously, Hayes received two DORs in July 2011, both of which had disciplinary hearings scheduled for July 19, 2011. (R. Vol. I, p. 64-65) Both DORs were a result of Hayes’ harassing attitude towards prison staff. *Id.* The evidence in the record demonstrates that the disciplinary hearing for the second DOR—which is the DOR Hayes has brought at issue here—did not violate due process.⁵

1. Notice.

The record demonstrates that Hayes received notice of his second disciplinary hearing on July 16, 2011, when he was served a copy of his DOR. (R. Vol. I, p. 65) The DOR informed Hayes of the offense he was being charged with, and the facts supporting the violation. The DOR also provided notice that a disciplinary hearing would be scheduled within the next seven days, but not before 24 hours from the time of service. (*Id.*) There was no further notice required by IDOC. Hayes does not dispute that he received service of the DOR. Therefore, Hayes received due process in regards to receiving notice of his hearing.

⁵ The disciplinary hearing for Hayes’ first DOR is not raised by Hayes as part of his claims of a constitutional violation, but instead is only discussed here in order to provide context as to why Hayes was not present for his disciplinary hearing with respect to the DOR at issue in this lawsuit.

2. Witness Statements.

Prior to the disciplinary hearing, Hayes had the opportunity to obtain witness statements, which would be considered at his hearing. (R. Vol. I, p. 65-66) However, Hayes failed to identify any witnesses he wanted a statement from. (*Id.*) It is not the job or duty of the disciplinary hearing officer to investigate and obtain witness statements on behalf of the inmate. Indeed, it would have been improper for Armfield to investigate the DOR prior to the hearing as she was the independent hearing officer. Hayes had the sole responsibility of identifying witnesses for his disciplinary hearing. He failed to do so. Witness statements cannot be forced by prison staff members.

As a result of Hayes' failure to identify any witnesses, there were no witness statements submitted for consideration at his second disciplinary hearing. Hayes had the opportunity to request witness statements, but he chose not to identify or request any witness statements. Accordingly, there is no due process violation based on the lack of witness statements at Hayes' disciplinary hearing, because Hayes failed to identify or request any specific witnesses.

3. Presence at the Hearing.

Generally, an inmate has a due process right to be present at a hearing, so long as doing so will not be unduly hazardous to institutional safety or correctional goals. *Wolff*, 418 U.S. at 566; *Ponte*, 471 U.S. at 499. Pursuant to this standard, IDOC created SOP 318.02.01.001, which required an inmate to be present at his disciplinary hearing unless certain situations required the

inmate's dismissal to ensure institutional safety or correctional goals.⁶ Specifically, SOP 318.02.01.001 requires an inmate to be dismissed from a disciplinary hearing when "the offender's disruptive or violent behavior calls for exclusion from the disciplinary hearing." *Id.* Thus, an inmate does not have a due process right to be present at his disciplinary hearing when the inmate is disruptive or displays inappropriate behavior.

Hayes had two disciplinary hearings scheduled for July 19, 2011. During the first disciplinary hearing, Hayes demanded access to video footage of the day room. (R. Vol. I, p. 65) For security reasons, inmates are not allowed to view video footage. (*Id.*) Therefore, Armfield denied Hayes' request to view the footage. (*Id.*) Upon being denied access to video footage, Hayes became very agitated and disruptive. (*Id.*) His behavior was so poor, that Armfield was forced to remove him from the hearing. (*Id.*) As a result of his disruptive behavior, Hayes was not permitted to return to his second disciplinary hearing. (*Id.* at 66)

Hayes had no due process right to be present at his second disciplinary hearing when he displayed disruptive behavior at his first disciplinary hearing occurring immediately before his second hearing. There was no reason to allow an agitated and disruptive Hayes to return to his second disciplinary hearing. This would have exacerbated an already disruptive situation and created a threat to institutional safety. Therefore, Armfield did not violate Hayes' due process rights by conducting the second disciplinary hearing without Hayes' presence.

⁶The Court can take judicial notice of this SOP as it is a publically available document and adopted by IDOC. See SOP 318.02.01.001, Disciplinary Procedures: Inmate, p. 25, available at: <https://www.idoc.idaho.gov/content/policy/755> (last accessed July 1, 2016).

Moreover, Armfield did not issue any discipline as a result of Hayes' second disciplinary hearing. Hayes' DOR records indicate that no sanctions were issued against Hayes as a result of his second DOR. (R. Vol. I, p. 66) Thus, there was no deprivation to Hayes' as a result of him not being present at that hearing. In addition, Hayes still had the ability through the DOR procedure to file an appeal to Armfield's determination. Thus, he had a full opportunity to still argue his position with respect to the DOR. Again, there were no sanctions imposed against him for this DOR, so there was nothing to reverse.

4. Administrative Segregation.

Hayes alleges that Armfield caused him to be placed in administrative segregation as a sanction for his second DOR conviction. (R. Vol. I, p. 21) This allegation is without merit. Armfield did not have the authority to sanction Hayes at the disciplinary hearing by reclassifying him to administrative segregation. (*Id.* at 64) Additionally, Hayes reclassification to administrative segregation was not a sanction from the confirmation of his July 13, 2011 DOR. (*Id.*) Hayes was reclassified to administrative segregation through in administrative process that occurred on a later date. (*Id.*) Hayes' reclassification was based on a variety of factors, including his overall conduct, his increasingly aggressive behavior exhibited towards staff throughout the entire time he was incarcerated at ICC, and his overall discipline record. (*Id.*) Accordingly, Hayes' assertion that his placement in administrative segregation due to his July 13, 2011 DOR was unconstitutional is without merit. His housing placement was pursuant to IDOC policy and not the result of any conspiracy against him.

Moreover, Hayes' disciplinary hearing for his July 13, 2011 DOR did not result in any sanctions or discipline at all. (*Id.* at 66) The only discipline issued against Hayes was a result of his first DOR, which Hayes does not allege was unconstitutional in any manner. (*Id.* at 65)

Based on the foregoing, Hayes has failed to raise a genuine dispute of material fact as to whether he was improperly denied procedural protections during his disciplinary hearing. Accordingly, Armfield was entitled to summary judgment as a matter of law, and the dismissal of the lower court should be affirmed.

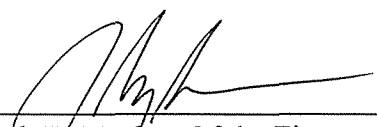
IV. CONCLUSION

For the reasons set forth herein, this Court should affirm the District Court's decision in total. Appellant has failed to set forth any meritorious argument as to why the District Court's decision was in error or should be reversed.

DATED this 7th day of July, 2016.

NAYLOR & HALES, P.C.

By



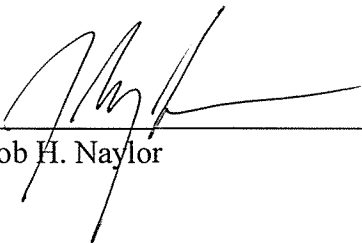
Jacob H. Naylor, Of the Firm
Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of July, 2016, I caused to be served, by the method(s) indicated, two true and correct copies of the foregoing upon:

Michael T. Hayes, #20633
I.S.C.C. F-1-211
P.O. Box 70010
Boise, ID 83707

 X U.S. Mail
 Email:
 Fax:



Jacob H. Naylor

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